drops out and the electorate at large are protected, in that, the former is not liable to commit a misdemeanor under any construction and the latter is protected from the unscrupulous office seeker who buys his way into positions of trust and honor. B. H. D.

WHEN ARE LETTERS WRITTEN BY A HUSBAND TO HIS WIFE NOT PRIVILEGED? —In a recent case decided in the supreme court of Michigan this interesting question was considered. *People* v. *Dunnigan* (1910), — Mich. —, 128 N. W. 180.

The case arose out of substantially these facts. The respondent, in connection with others, was prosecuted and convicted of murder in the first degree. The principal, if not the only, evidence produced by the state to connect respondent with the commission of the crime, was a certain letter written by Dunnigan to his wife, under the following circumstances. While respondent was in jail, awaiting trial, one Wilcox, an acquaintance of the respondent, was admitted to his cell, and suggested to respondent that if he wished to communicate with his wife, he, Wilcox, would carry a letter to her, whereupon respondent wrote and addressed to his wife the letter above referred to.

He delivered the letter to Wilcox, who in pursuance of a previous agreement, gave it to the sheriff. The letter was produced in evidence against respondent at his trial, and admitted, and on the strength of the statements which it contained he was convicted. On appeal he based error on the admission of the letter in evidence, contending that it was a confidential communication between husband and wife, and as such, privileged. The Supreme Court of Michigan per BROOKE, J., affirmed the conviction, holding that the letter was not a privileged communication under the circumstances of the case, and citing and relying upon their previous decision in *O'Toole* v. *Ohio German Fire Insurance Co.*, 159 Mich. 187, 24 L. R. A. (N. S.) 802.

The authorities are not entirely in accord, as to just what circumstances will render admissible in evidence a communication between husband and wife, which would, but for those circumstances, be privileged. When, however, we consider the circumstances under which the letter was written and delivered, together with the considerations which lie at the foundation of the whole rule as to privileged communications between husband and wife, it would seem as if the decision of the court in *People* v. *Dunnigan,* supra, is at least doubtful. TAYLOR, C. J., speaking for the Supreme Court of Florida, in *Mercer* v. *State,* 40 Fla. 216, stated the basic reason of the rule of privileged communications between husband and wife as follows:—"Society has a deep-rooted interest in the preservation of peace of family, and in the maintenance of the sacred institution of marriage, and its strongest safeguard is to preserve with jealous care from any violation those hallowed confidences inherent in it, and inseparable from the marriage status. Therefore the law places the ban of protection upon any breach of the confidence between husband and wife, by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses." See also *State* v. *McAuley,* 4 Heisk. 424. It is quite apparent that a communication,

even between husband and wife, to come within the purview of the rule of privilege, must be intended by the party making it to be secret and confidential. 4 WIGMORE, EVID., § 2336 and cases there cited. It has been said, however, that all communications made by one spouse to the other during the continuance of the marital relation must be presumed to be confidential, until circumstances surrounding the communication be shown, which will rebut that presumption. 4 WIGMORE, EVID., § 2336 and cases there cited.

In many of the statutes of the several states upon this subject, the element of confidence is not expressed, as for example the Michigan statute, under which *People* v. *Dunnigan* was decided. [C. L. Mich. (1897), § 10,213]. This statute has been construed in *Ward* v. *Oliver,* 129 Mich. 300, as declaratory of the common law rule as to privileged communications between husband and wife, and that only secret and confidential communications are within its purview; while the Supreme Court of Minnesota in *Leppla* v. *Tribune Co.,* 35 Minn. 310, construing a similar statute, held that the statute included communications not within the common law rule.

The statute under which the principal case was decided having been construed as declaratory of the common law rule upon the subject, it becomes necessary to inquire under what circumstances a communication made by one spouse to the other and intended by the party making it, to be secret and confidential, will be deprived by reason of the circumstances surrounding its transmission, or by reason of the occurrence of subsequent events, of the privileged character which the law because of its inherent nature, impresses upon it at its inception. Before taking up that question it would be well to note that a written communication occupies precisely the same position with respect to the question of privilege as does a communication made by word of mouth, and that a husband or wife does not by implication waive in any degree the right to have the communication privileged by reason of the mere fact that by putting it in a permanent form renders greater the possibility of its contents becoming known to strangers. *Ward* v. *State,* 70 Ark. 204; *Henderson* v. *Chaires,* 25 Fla. 26; *Derham* v. *Derham,* 125 Mich. 109; *State* v. *Ulrich,* 110 Mo. 350; *Selden* v. *State,* 74 Wis. 271. Under a statute of Massachusetts, (Pub. Stat. C. 169, 8 sub. 1,) the Supreme Court of that state has held that letters are not within the privilege, *Com.* v. *Caponi,* 155 Mass. 534, citing 1 GREENL., EVIDENCE, § 254.

Coming now to consider what circumstances will destroy the privilege, accorded by the policy of law, to communications made in the confidence of the marital relation, a critical examination of the cases seems to disclose the fact that one line of authorities appears to regard the essential nature of the communication as the test, whereby to determine whether it be privileged or not, while the other line of cases seems to regard the custody from which it was produced as a most significant, if not a determining, factor. As examples of the first line of authorities may be cited *Scott* v. *Com.,* 94 Ky. 511; *Wilkerson* v. *State,* 91 Ga. 729; and *Mercer* v. *State,* 40 Fla. 216. In all of these cases it is held that a letter of the husband to the wife, or vice versa, although in the custody of a third party, is still privileged. The Court in *Mercer* v. *State,* supra, states the reasoning relied on by this line of authori-

ties in these words:—"We * * * think the policy of the law, that favors the foundation of the general rule is far more strongly upheld by those authorities that recognize and declare certain classes of communications to be privileged from the inherent nature of the communication itself, and that in such cases the privilege attaches to the communication itself and protects it from exposure in evidence wheresoever and in whosesoever hands it may be." The court, in its opinion in that case expressly approved of the language of Judge SHIRAS in the case of *Liggett* v. *Glenn,* 2 C. C. A. 286, 301, 51 Fed. 381, announcing substantially the same rule. See also to the same effect *Bowman* v. *Patrick,* 32 Fed. 368; *Regina* v. *Pamenter,* 12 Cox C. C. 177; *Dreier* v. *Cont. Ins. Co.,* 24 Fed. 670; *Mahner* v. *Linck,* 70 Mo. App. 380; *Mitchell* v. *Mitchell,* 80 Tex. 101. Having regard to the reasons lying at the foundation of the rule for privilege for this class of communications, it would seem that the holding in the line of authorities just referred to, best subserves the purposes for which the rule was established: If a communication, whether oral or written, once takes upon itself the character of being privileged it is difficult to see how the party for whose benefit the law grants the privilege can be deprived of it except by his own consent or by the occurrence of facts from which a waiver can be implied. Now a waiver has been judicially defined to be "an election by a party to forego some advantage he might have had" (*Supreme Lodge K. of P.* v. *Quinn,* 78 Miss. 525), "and cannot arise out of acts done in ignorance of material facts." (*Freedman* v. *Fire Assn. of Phil.,* 168 Pa. St. 249; *Bennecke* v. *Conn. Mut. Ins. Co.,* 105 U. S. 355). How can it be said then that a party waives the benefit of this privilege, which the law impresses upon his communication with his spouse from its inception, by the fact that it was overheard by another inadvertently, or by an eavesdropper, or that the writing was taken by stealth from the custody of the person for whom it was intended. In other words how can a waiver be implied from facts of which the party, who is said to have waived the privilege, was entirely ignorant?

Yet it has been held by a number of respectable courts that if the communication escapes the custody of the parties no matter whether it be by accident or by the trickery or stealth of a third party, the privilege is lost. *O'Toole* v. *Ohio Ger. Fire Ins. Co.,* supra. See also *State* v. *Buffington,* 20 Kan. 599; *Lloyd* v. *Pennie,* 50 Fed. 4; *Brown* v. *Brown,* 53 Mo. App. 453; *State* v. *Hoyt,* 47 Conn. 518; *Com.* v. *Griffin,* 110 Mass. 181; *State* v. *Mathers,* 64 Vt. 101. In the case of *Hammons* v. *State,* 73 Ark. 495, a case arising upon almost identically the same facts as those in the principal case, a letter delivered to a messenger by a man in jail and by the messenger handed over to a third party was admitted, the court apparently following the ruling in *State* v. *Ulrich,* 110 Mo. 350. All these cases seem to proceed upon the theory that the party making the communication tacitly assents that if the communication escapes his control, or that of the party for whom it is intended, he waives the benefit of the privilege which the law for reasons of public policy confers upon a confidential communication made by one spouse to the other. And yet some of these same courts have decided that if the spouse receiving the communication divulge its contents to a third party

the privilege is not lost. *Wilkerson* v. *State,* supra; *Selden* v. *State,* supra. How it can be contended that the spouse making the communication impliedly assented to and took the risk of the contents thereof being obtained by stealth but did not assume the risk of the other spouse violating his confidence, is not very clear. It may be said that in fact he assents to neither, and that if he supposed that either event would happen he would never have made the communication at all. It would seem that the whole theory that a party assumes the risk of being overheard or having his letter to his spouse stolen or lost either before or after delivery and the privilege being thereby lost, proceeds upon an erroneous assumption that the privilege is accorded by the law for the sole benefit of the particular person making the communication, when in fact the whole rule as to privileged communications between husband and wife is grounded on broad considerations of public policy, and upon the interest which the public has in the fostering and preservation of the marital relation, and was not designed purely for the personal benefit of the immediate parties to that relation.

Moreover it is to be noted that in nearly all the cases in whcih it has been decided that the privilege is lost if a third person by accident or design overhear a confidential communication between husband and wife or obtain a letter written by one to the other, the contents of the communication were divulged to such third party by the very act by which it was being transmitted to the person for whom it was intended. In this respect the cases are distinguishable from *People* v. *Dunnigan,* supra, for in that case no act of respondent's directly placed the contents of the communication within the knowledge of a third party, as it does not appear that Wilcox, to whom the letter was delivered, was acquainted with its contents. Respondent in that case did everything in his power to keep it secret, which is not the case where a man orally communicates with his wife without first assuring himself that no one overhears, in which latter case by the very act of transmitting the communication he puts the third party in possession of its contents. Suppose in the principal case the respondent had duly addressed and sealed the letter in question and placed it in the mails for transmission to his wife, and it was surreptitiously extracted therefrom by a third party, or wrongfully opened by a mail clerk and thus its contents became known. Would the privilege then be lost? On principle we submit it would not. If it should be so held, the privilege accorded to letters between husband and wife would be practically destroyed, for then all that would be required to make evidence against the party would be to unlawfully and fraudently extract his letters from the custody of the very agency which the law provides for their transmission. Is it reasonable that the law should require one to forfeit a right which the law gives him in case he resorts to the agency furnished him for the safe transmission of his confidential communications, and they escape without fault of his from the custody of that agency? It would seem that justice demands that no such burden be placed upon him. And is respondent in *People* v. *Dunnigan* to be placed in a worse position because he employed a private messenger, a perfectly legal and appropriate method of transmission? On principle we think he should not be. McK. R.